

JOSEPHINE MICHAEL

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v.

PERKAYUAN PERPADUAN SDN. BHD. & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR

GUNN CHIT TUAN J

[APPLICATION FOR EXECUTION NO. 268 OF 1982]

b

5 OCTOBER 1988

CIVIL PROCEDURE: *Allegation of fraud in statement of defence - Whether particulars in statement of defence sufficient - Whether Court can still have regard to allegation of fraud even if not properly pleaded - Issue of illegality of assignment of timber licence not pleaded - Whether the Court can consider the issue - Execution by defendant - Whether plaintiffs bona fide purchasers of items under seizure.*

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Josephine Michael (“the defendant”) had obtained judgment in default against Perkayuan Perpaduan Sdn. Bhd. The defendant then levied execution on a sawmill at Simpang Kiri, Ulu Kimanis, Sabah which was formerly operated by Perkayuan. Certain items were seized and some of the items were released subsequently. SKT Industries Sdn. Bhd. (the first plaintiff) and Kimanis Industries Sdn. Bhd. (the second plaintiff”) filed a notice by claimants of property taken in execution. The defendant disputed the claim and by a consent order the execution was lifted upon the plaintiffs (as claimants) paying a sum of RM250,000 deposited in a bank account in the joint names of the solicitors for both parties.

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The plaintiffs claimed that they had acquired a right to the concession and the sawmill thereon by virtue of a substitute of power of attorney from the licence holders and by two agreements. They also relied upon a receipt dated 10 June 1980 issued by Perkayuan to maintain that there was a *bona fide* transaction between themselves and Perkayuan and that the goods seized were therefore theirs. The defendants contended that the transaction was a sham transaction designed to evade creditors of Perkayuan.

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The defendant also alleged fraud in the transaction. The plaintiffs submitted that the plea of fraud was inadequate as the particulars set out in the statement of defence were insufficient to constitute particulars.

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The defendants raised the issue that the assignment or transfer of the licence was illegal by virtue of s. 24 of the Forest Enactment 1968 [Sabah] and in reply the plaintiffs alleged that this issue was not pleaded and only raised in the submission and therefore the Court should not consider it.

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Held:

[1] The evidence of the plaintiffs’ witnesses clearly showed that the plaintiffs had purchased the items which were seized and they had produced documentary proof of the purchases.

[2] The issue of illegality of the transfer of the licence of the timber concession was not pleaded and therefore was not an issue for the Court to decide in this case.

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[3] That although the plea of fraud in the statement of defence was inadequate nevertheless the Court could consider whether fraud was in fact proven by the defence and on the evidence as well as submissions of Counsel the Court found that there was insufficient evidence to establish fraud.

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- a** [4] That the plaintiffs had therefore succeeded in proving their claims and have proved on the balance of probabilities that the goods seized belonged to the plaintiffs.

Cases referred to:

Haddow v. Morton [1894] 1 QB 565

Natal Land & Colonization Co. Ltd. v. Pauline Colliery and Development Syndicate Limited [1904] AC 120

- b** *Newborne v. Sensolid (Great Britain) Ltd.* [1954] 1 QB 45
Lo Su Tsoon Timber Deport v. Southern Estate Sdn. Bhd. [1971] 2 MLJ 161

Legislation referred to:

Forest Enactment 1968 [Sabah], ss. 23, 24

Rules of the High Court 1980, O. 17 r. 5

Supreme Court Practice 1988 [UK], O. 18 r. 8

- c** *For plaintiffs* - *W. Abraham; M/s. Shearn Delamore & Co.*
For defendant - *R. Rajasooria; M/s. Rajasooria, Son & Proctor*

JUDGMENT

Gunn Chit Tuan J:

- d** One Josephine Michael (hereinafter referred to as “the defendant”) had apparently obtained a default judgment on 3 February 1982, against a limited company called Perkayuan Perpaduan Sdn. Bhd. (hereinafter referred to as Perkayuan) of which one Augustine Michael, her son or nephew, was the managing director. On 17 September 1982, the defendant, after an interval of about eight months, proceeded to levy execution on a sawmill at Simpang Kiri, Ulu Kimanis, Sabah which was formerly operated by Perkayuan. Certain items there as listed in the bailiffs
- e** inventory (Exhibit D4) were seized in execution. Some of the items seized were released from execution on or about 17 or 18 September 1982, whilst the remaining items remained under seizure. On 7 October 1982, SKT Industries Sdn. Bhd. (hereinafter referred to as the first plaintiff) and Kimanis Industries Sdn. Bhd. (hereinafter referred as the second plaintiff) filed a notice by claimants of properties taken in execution. The defendant as execution creditor disputed the claim and by a consent order in the High Court on 11 May 1983, the execution
- f** was lifted upon the plaintiffs as claimants paying a sum of RM250,000 which was deposited in the Standard Chartered Bank, Kuala Lumpur in the joint names of the solicitors for both parties. The issue tried by the Court was therefore simply to determine who was entitled to the RM250,000 together with interest accruing thereon. The Court was, of course, entitled to make the said consent order pursuant to O. 17 r. 5 of the Rules of the High Court 1980 (*Haddow v. Morton*) [1894] 1 QB 565. It was also ordered that the issue was to be tried by
- g** way of a trial.

- h** The claim of the plaintiffs was based essentially on the first plaintiff’s assertion that they had acquired the right to the concession concerned and the sawmill thereon by virtue of a substitute of power of attorney dated 25 November 1980 (Exhibit P13) from one Haji Matahir bin Mohd. Yunus and Abdul Rashid bin Awang Pakar @ Durasik, who were the licence holders, to the first plaintiff, a power of attorney No. 7730 (Exhibit P14) and two agreements dated 26 May 1980 and 28 May 1980 (Exhibits P15 and P16 respectively). Apart from the said documents the plaintiffs also relied upon a receipt (Exhibit P17) dated 10 June 1980, issued by Perkayuan to maintain their claim that there was a *bona fide* transaction between themselves and Perkayuan and/or the said Augustine Michael. It was the defendants case that the transaction between the first plaintiff and Perkayuan and/or Augustine Michael was
- i** a sham transaction designed to evade creditors of Perkayuan.

A second point taken by the defendant was that there was fraud as set out in para. 8 of the statement of defence. On this point it was the submission of Mr. Wilfred Abraham, Counsel for the plaintiffs, that the plea of fraud was inadequate as the particulars set out in the statement of defence were insufficient to constitute particulars. He referred to the Supreme Court Practice 1988 O. 18 r. 8 at p. 277 where it is stated that any charge of fraud or misrepresentation must be pleaded with the utmost particularity. It was submitted that a mere reference to earlier paragraphs in the statement of defence was insufficient and that fraud must be distinctly alleged and distinctly proved.

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It was the plaintiffs' claim that the goods seized were theirs and in the course of trial they called three witnesses and have also tendered in evidence various documents to prove their title to the same. The defence considered most if not all those documents as a sham.

Briefly, the evidence adduced by the plaintiffs was as follows. One Lek Soo Heng (PW1) who was the manager in charge of the timber concession factory at Simpang Kiri, Kimanis, Sabah, told the Court that he was present when the execution took place. He also told the Court that some of the items seized did not have invoices but the rest of the items were supported by documents as shown at pp. 4 to 34 of Exhibit P1. The witness also produced a bundle of documents issued under Forest Rules 1982 (Exhibit P2) and explained that those disposal permits show that cess on all the logs seized were paid by the plaintiffs. He also stated that the sawmill was rented by the second plaintiff from the first plaintiff.

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During cross-examination PW1 confirmed that the items referred to in the notice by claimants of properties taken in execution (Exhibit D3) belonged to his company, i.e. the second plaintiff. He also confirmed that the items listed in the said notice (D3) corresponded with the items in the inventory (Exhibit D4) which was shown to him by Mr. Rajasooria, Counsel for the defendant.

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The second witness called was Low Kim Nam (PW2), a director of the second plaintiff who identified the agreement (Exhibit P7) between the second plaintiff and the first plaintiff which authorised the second plaintiff to extract timber from the concession, to run the sawmill and to pay royalties for the timber extracted. He confirmed that the first plaintiff had shown the second plaintiff some receipts and had informed them that the sawmill was bought from Perkayuan. That witness identified a copy of the receipt (Exhibit P8) issued by Perkayuan to the first plaintiff. Under cross examination the witness stated that as far as he knew the first plaintiff had bought the sawmill from Perkayuan although he did not know whether it had also bought the timber concession.

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The third witness was one Lim Siong Poh (PW3) who told the Court that he was formerly in the business of logging. He produced a licence No. E. 197814 issued to Syarikat Klias Timbers Industries (Exhibit P10) and explained that it was a partnership before it was later dissolved and converted to SKT Industries Sdn. Bhd., i.e. the first plaintiff, in 1980. He also produced a certificate of incorporation of the first plaintiff (Exhibit P11). The witness then explained that as at 26 May 1980, Perkayuan owed a company called Borneo Logging Sdn. Bhd. a sum of RM243,202.08 and after several discussions Syarikat Klias Timbers Industries took over the liabilities of Perkayuan pursuant to the agreement dated 26 May 1980 (Exhibit P15). After that Syarikat Klias Timbers Industries took over the contract from Borneo Logging Sdn. Bhd. The witness also explained that all along it was Syarikat Klias Timbers Industries which was dealing with Perkayuan but the partners of Syarikat Klias Timbers Industries including himself later decided to convert Syarikat Klias Timbers Industries into a limited company i.e. the first plaintiff. The witness then said that after discussions it was suggested that Perkayuan should sell the rights of the forest compartment and the properties in the sawmill to them. Discussions

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- a** took place around June 1980. The witness then identified the signatures of the managing director of Perkayuan on both the agreements P15 and P16. He said that he was present when the said Augustine Michael signed P15 and P16. He also produced the receipt No. 0518 dated 10 June 1980, (P8) signed by the managing director of Perkayuan. The witness then identified two invoices Nos. 0267 and 0268 (Exhibits P18A and 18B) issued by Perkayuan and confirmed that all those equipment referred to in them had been paid for. The witness
- b** told the Court that the first plaintiff had worked the forest concession and sawmill in question since 17 June 1980. Between that date and the date of execution on 17 September 1982, he has not had any dealings with Perkayuan.

- c** During cross-examination, the witness was shown a letter from Perkayuan to the said Haji Matahir bin Mohd. Yunus and Abdul Rashid bin Awang Pakar dated 17 June 1980 (Exhibit D9) and confirmed that the sum of RM356,386 was paid to Perkayuan on 10 June 1980, in cash. The first plaintiff paid to Augustine Michael. He also confirmed that Syarikat Klias Timbers Industries had bought the machinery referred to in the invoices marked Exhibits P18A and 18B. When challenged he disagreed with the suggestion of Counsel that the agreements marked P15 and P16 and the receipt P17 were to enable Perkayuan to escape its liabilities.

- d** Mr. Rajasooria referred to the agreement marked Exhibit P16 and pointed out it was dated 28 May 1980, and was purported to be between the first plaintiff and Perkayuan but was signed by Syarikat Klias Timbers Industries. He stated that according to the evidence of PW3 it was clear that the first plaintiff was not incorporated until 25 August 1980. He therefore submitted that P16 was a nullity and there was no binding contract between the plaintiffs and Perkayuan to take over any of the assets. Counsel referred to and relied on *Natal Land and Colonization Company Limited v. Pauline Colliery and Development Syndicate Limited* [1904] AC 120 in which it was held that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its own behalf before the company came into existence. He also referred to *Newborne v. Sensolid (Great Britain) Ltd.* [1954] 1 QB 45 in which it was held that a contract purported to be made by a company, on whose behalf it was signed by a future director, and inasmuch as the company was non-existent at the material time, the contract was a nullity. On this point it was the contention of Mr. Wilfred
- f** Abraham that on close examination, the factual position as suggested by the defendant was wrong. He contended that the agreement was entered into by Perkayuan with Syarikat Klias Timbers Industries which was a partnership at the material time and which later became a limited company. He stated that there was evidence that the partnership had been properly registered with the authorities and the defence contention that the agreement was a nullity was without merit and substance and that the authorities relied on by the defence were
- g** irrelevant. In any event he pointed out that the agreement (P16) was never put into effect and that was why Syarikat Klias Timbers Industries had to buy the equipment and the Court should not concern itself with the agreement P16. Counsel referred to the evidence of PW3 and pointed out that the witness had given a sufficient explanation. He, therefore, submitted that there was no evidence of fraud and also pointed out that in any event the law was clear on this issue, namely, that he who asserts a contention must prove it. It was his
- h** submission that since the defendant was challenging the authenticity of the documents it was for her to prove that the documents were in fact a sham but the defence has not provided any evidence to that fact.

- i** Although the plea of fraud in the statement of defence was inadequate, nevertheless the Court did consider whether fraud was in fact proved by the defence. Having considered the evidence, both oral and documentary, as well as the submissions of Counsel, I was satisfied and found that Exhibits P16 and P17 taken together did not provide sufficient evidence to

establish fraud. I also agreed with Mr. Wilfred Abraham that execution was only levied in 1982 whilst the documents produced in evidence were in existence prior to 1980. The defendant, as the alleged execution creditor, only demanded payments from Perkayuan, which was managed by her own son or nephew, in October 1981, whereas Syarikat Klias Timbers Industries had entered into transactions with Perkayuan in 1980 i.e. nearly two years before the date of execution.

Mr. Rajasooria also submitted that the purported assignment or transfer of the licence holders' rights of the timber concession to Syarikat Klias Timbers Industries was illegal because of s. 24 of the Forest Enactment 1968 (Sabah). He referred to *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161 in which it was held that the agreement in that case was clearly in breach of the provisions of ss. 23 and 24 of the Forest Enactment 1968 and was therefore illegal and any claim based thereon could not be endorsed. Counsel stated that the power of attorney in this case was a colourable device and therefore the plaintiffs could not have any claim to the logs seized. On the question of illegality Mr. Wilfred Abraham pointed out that the licence in question was issued to two Malay gentlemen who had been hawking it and stated that the Court in this case was not concerned with the forest licence but only with the ownership of the goods seized. He pointed out that the question which the Court had to decide was therefore whether the assets taken in execution were those of Perkayuan or of the plaintiffs. The forest licence was not in issue but the goods attached were the subject-matter in this case. In any event he pointed out that the question of illegality was only raised for the first time during submission and was not pleaded by the defendant in her statement of defence. He submitted that the Court should not therefore concern itself with this point although he conceded that the Court could at any time take cognizance of illegality. But he also pointed out that if the argument of the defence on this point was tenable then Perkayuan would also have no right of property to the goods seized and thus the claim of the defendant must also fail because the items seized, which were in the possession of the plaintiff, would also not be the property of Perkayuan. Finally, Mr. Wilfred Abraham stated that the plaintiffs must prove that the goods seized were theirs at the time of attachment and that the transaction with Perkayuan was *bona fide*. He submitted that the plaintiffs through the witnesses called have shown clearly that they purchased the goods that were in the sawmill and further that they had paid all the monies to the authorities to extract the logs. The evidence of the plaintiffs' witnesses show that the items seized were purchased by them and they have produced documentary evidence of the purchases and further evidence that they have been paying cess for the logs seized. I agreed with Counsel for the plaintiff that the issue of illegality of the transfer of the licence of the timber concession was not pleaded and was not an issue for the Court to decide in this case. Having considered the pleadings, the evidence and all the circumstances of this case, I was satisfied and found that the plaintiffs have succeeded in their claim and have proved on the balance of probabilities that the goods taken in execution were their property and that they were genuine purchasers.

Also found at [1989] 1 CLJ 25

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